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In the Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN A. TYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge's decision not to allow the defense to question a prosecution witness about a collateral matter was prejudicial to the defendant.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet reported. The opinion of the Air Force Court of Military Review (Pet. App. 2a-8a) is reported at 26 M.J. 680.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 31, 1989. The petition for a writ of certiorari was filed on May 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial at Fairchild Air Force Base in Washington, petitioner, a member of the United States Air Force, was convicted of the possession, use, and

distribution of cocaine and the use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a (Supp. V 1987). He was sentenced to confinement for ten years, a dishonorable discharge, total forfeiture of pay and allowances, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review vacated petitioner's conviction for the possession of cocaine, but otherwise affirmed the findings and the sentence.[1] The Court of Military Appeals summarily affirmed.

1. On January 13, 1987, Sergeant Mark Baker, a friend of petitioner's, was interviewed by the Fairchild Base Security Police about his large purchases of liquor from the base package store during 1986. Tr. 184.[2] During the interview, Sergeant Baker, who was not under investigation for narcotics crimes, volunteered that he had used marijuana for the past two years and knew about narcotics use by other servicemembers at the Fairchild Base. Tr. 188-191. The next day, agents of the Fairchild Office of Special Investigations (OSI) questioned Baker about his knowledge of narcotics use and trafficking by other servicemembers. Tr. 191. Sergeant Baker agreed to work for the OSI as an undercover informant and to make controlled purchases of narcotics. Tr. 190, 192. Thereafter,

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[1] The court of military review found that the sentence was appropriate in light of petitioner's disciplinary history, which included a prior conviction for drug trafficking. Pet. App. 7a; PX 26, at 2.

[2] Sergeant Baker had been experiencing financial trouble for the past one-and-one-half to two years. To generate cash to pay his debts, Baker would charge bottles of liquor to his account at the base package store and then resell the liquor off base for cash at a lower price. Tr. 185-187, 254-259. Over time, that practice compounded his financial difficulties. The state liquor authorities were also aware of his illegal practice. Tr. 188-189, 239.

Sergeant Baker made controlled purchases from petitioner and others on several occasions.[3] The charges against petitioner (except for one specification) stemmed from Sergeant Baker's role in those purchases.

2. At trial, in an effort to impeach Sergeant Baker's credibility, defense counsel cross-examined him at length. The cross-examination probed into discrepancies in Baker's initial statement to the OSI, Tr. 231-232, 279-282, Baker's financial problems and alcohol sales, Tr. 254-259, and the possibility that Baker's commander might be able to persuade his superiors not to court-martial or to discharge him because of his assistance to the OSI. Tr. 238-250, 254-264. In the midst of cross-examination, defense counsel asked Sergeant Baker whether a video cassette recorder (VCR) had been stolen from him. Tr. 265. After establishing that a VCR had been stolen and that Baker had filed an insurance claim in June 1986 for

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[3] The OSI agents followed the same procedure on each occasion. When Baker arrived at the staging area, he was stripped and his body cavities searched, his clothes were thoroughly examined, his car was searched in its entirety (*e.g.*, the interior, trunk, glove compartment, floor mats, visors, underneath the dashboard, and any packages in the car). Baker was given money after the serial numbers were recorded. Baker was then escorted to his car by the agents, who followed him to petitioner's trailer. The six agents, in three teams, positioned themselves around the trailer while Baker was inside. The agents followed Baker if he left the trailer in his car (although on two occasions they lost sight of him temporarily). After he left petitioner's trailer, Baker returned to the staging area, where he gave the agents the narcotics and was searched once again. Within 15-20 minutes after each purchase, Baker gave the agents a statement explaining what had occurred inside the trailer. Tr. 117-127, 129-133, 139-141, 145.

Sergeant Baker made controlled purchases from petitioner of cocaine or marijuana on January 21, 24, and 30, and February 2 and 6, 1987. Tr. 119-145, 193-219. Petitioner also sampled the narcotics he sold to Baker.

the theft, defense counsel asked whether the claim was fraudulent. Tr. 266-267. After Baker said it was not, the prosecutor objected to any further questioning on that subject on the ground that the inquiry was collateral to the issues in the case. In response, defense counsel argued that the question was proper under Mil. R. Evid. 608(b), because it was probative of Baker's truthfulness. Tr. 268. The judge overruled the prosecutor's objection, Tr. 269-270, but cautioned defense counsel that extrinsic evidence of misconduct was inadmissible under the rule. Tr. 270. When cross-examination resumed, defense counsel again asked Baker whether his insurance claim was fraudulent, and Baker again denied that charge. Tr. 271-272.

At that point, after establishing that Sergeant Baker knew an Airman Gerald Harrington, defense counsel started to ask Baker, "[d]o you recall telling him that he ought to do what you did * * *." Tr. 272. The prosecutor again objected. At an ensuing bench conference, defense counsel argued that he was not offering extrinsic evidence, but was seeking to offer, pursuant to Mil. R. Evid. 613(b), evidence of a prior inconsistent statement to impeach Baker. Tr. 273-274. According to defense counsel, Airman Harrington was dissatisfied with a television set that he had recently purchased, and Baker told Harrington that he could make some additional money by submitting a false theft claim for the television, as Baker said he had done with his VCR. Tr. 273. The trial judge disallowed the question, on the ground that "it had a very limited collateral connection with this case" and was "minimally probative of truthfulness as to this witness concerning these charges and specifications." Tr. 274.[4]

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[4] Later, petitioner called Airman Harrington to testify during the defense case. At a hearing out of the jury's presence, defense counsel

3. The Air Force Court of Military Review affirmed in part and reversed in part. Pet. App. 2a-8a. It vacated petitioner's conviction for possession of cocaine on the ground that the evidence was insufficient. *Id.* at 7a-8a. Otherwise, the court affirmed petitioner's convictions and sentence. The court rejected petitioner's claim that the trial judge erred by preventing the defense from questioning Sergeant Baker about his alleged statement to Airman Harrington. The court ruled that the trial judge did not abuse its discretion in sustaining the objection to that question. *Id.* at 6a.

4. The Court of Military Appeals affirmed petitioner's conviction in a one-sentence per curiam order. Pet. App. 1a. Although the court did not discuss the merits of petitioner's claim, the court cited the military harmless error statute, Art. 59(a), UCMJ, 10 U.S.C 859(a).

ARGUMENT

Petitioner argues that the trial court erred in ruling that he could not ask Sergeant Baker whether Baker told Airman Harrington that he had submitted a false insurance claim for his VCR.[5] According to petitioner, the courts

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asked permission to question Harrington about Sergeant Baker's alleged statements about the theft of the VCR and the insurance claim. The trial judge denied the request, holding that the testimony would be extrinsic evidence of a collateral matter. Tr. 340. Harrington then testified that, in his opinion, Baker was not truthful and did not have a reputation for truthfulness. Tr. 344.

[5] Petitioner claims that the trial court's ruling violated the Confrontation Clause of the Sixth Amendment, Pet. 5, but petitioner did not object at trial on that ground. He claimed only that the question was proper under Mil. R. Evid. 613. See Tr. 268-271, 273-276. In any event, the Court of Military Appeals apparently regarded the error, if any, as harmless, and an erroneous limitation on defense cross-examination can be harmless. *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). See *Olden* v. *Kentucky*, 109 S. Ct. 480, 483 (1988).

below erred by treating that question as an effort to impeach Sergeant Baker with extrinsic evidence on a collateral matter, rather than as an attempt to elicit an admission of wrongdoing from Baker. Pet. 4-5, 7.

The Court of Military Appeals did not address the merits of petitioner's claim. Rather, by citing the military harmless error statute, 10 U.S.C. 859(a), the court appeared to conclude that the alleged error was harmless and that the conviction should be affirmed for that reason. Accordingly, the propriety of the trial court's ruling is not the question here. The only issue is whether that ruling, if erroneous, was so prejudicial that petitioner's conviction should be reversed. Petitioner does not address that issue at all, and that factbound question does not warrant review by this Court.

The Court of Military Appeals was correct in finding that any error committed by the trial judge with regard to the disputed evidence was harmless. The allegedly fraudulent insurance claim was collateral to the issues in the case, and the court-martial panel already had a substantial basis for assessing Sergeant Baker's credibility. The panel was fully aware that Sergeant Baker might have been "cooperating" with the prosecution in order to avoid being fined by state liquor officials or being discharged from the Air Force.[6] The defense was able use that

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[6] Baker testified that, when he was stopped for speeding, he was told by a highway patrolman that he was under investigation for "bootlegging," Tr. 188, and that he was told by a member of the state liquor control board that it was "more than likely" that he would be fined for his activity unless he cooperated with the OSI, Tr. 188. Baker also conceded that he had told the OSI that he had used marijuana for one-and-one-half to two years, Tr. 191; that he had been given an official reprimand for his drug use, but had not been court-martialed or given a summary punishment under Art. 15, UCMJ, 10 U.S.C. 815, for those crimes, Tr. 240, 244, 246; and that whether he

evidence to contend that Baker had contrived the entire scheme in order to deflect the OSI's attention from his own activities.[7] At the same time, the most damaging evidence against petitioner was the combination of two facts: First, on the occasion of each controlled purchase Sergeant Baker emerged from petitioner's trailer with narcotics after the OSI agents had painstakingly ensured that Baker was not carrying narcotics before he entered. See page 3 note 3, *supra*. Second, petitioner did not rely on an alibi defense, nor did he argue that someone else in the trailer gave Baker the narcotics retrieved by the OSI agents.[8] Under these circumstances, the trial court's restriction on the defense cross-examination of Sergeant Baker did not have a material effect on the verdict.

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would be discharged from the Air Force was dependent on his cooperation with the OSI. Tr. 250.

[7] Baker conceded that he volunteered that he was aware of drug use by servicemembers and agreed to assist the OSI only after he was questioned about his excessive alcohol sales. Tr. 184. Since Baker's repeated liquor sales placed him deeper and deeper in debt, and since he did not seek available financial assistance from the Air Force, the defense also contended that "[Baker] was doing something else," and "nobody has ever gotten to the bottom of what he was doing." Tr. 381. Baker also conceded on cross-examination that he had not purchased narcotics from petitioner during the past six months, and that Baker did not mention petitioner's name to the OSI until after Baker had been questioned about his sale of alcohol, Tr. 229-232, which allowed the defense to argue that Baker had set up petitioner to take the heat off himself.

[8] Defense counsel contended in his closing argument that, after entering petitioner's trailer, Baker slipped out the back door and retrieved narcotics that he had previously hidden in petitioner's back yard in order to frame petitioner. Tr. 378-380, 383. But petitioner offered no evidence suggesting where in his yard the narcotics were or could have been hidden. Moreover, Agent Childress testified that

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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Baker knew that he was under constant surveillance by the OSI agents, but did not know where the agents conducting the surveillance were positioned around the trailer. Tr. 124, 127, 129. During the first controlled purchase, Agent Childress was also in a position to see whether anyone left the trailer through the back door, and he saw no one leave. Tr. 173, 176-177, 179-180. Petitioner's scenario is therefore implausible.

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